FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: Rosemary C. Smith
Associate General Counsel

FROM: Office of the Commission Secretary

DATE: May 13, 2004

SUBJECT:: *Ex Parte* COMMUNICATION REGARDING
DRAFT AO 2004-13

Transmitted herewith are two facsimiles received by Chairman Smith from Donald F. McGahn II, General Counsel for the National Republican Congressional Committee, regarding the above-captioned matter.

Proposed Advisory Opinion 2004-13 is on the agenda for Thursday, May 13, 2004.

Attachment:

May 13, 2004

The Honorable Bradley A. Smith
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: **Comments On Draft Advisory Opinion 2004-13**

Dear Chairman Smith:

These comments on Draft Advisory Opinion 2004-13 are submitted on behalf of Friends of Melissa Brown. The campaign would like to bring to the Commission's attention that the questions posed by the requestor are hypothetical, and the assumptions underlying the request are wrong. The primary in question has occurred, and the theories put forth by the requestor did not come to pass.

The question presented uses the word "if" no less than three times; the hypothetical nature of the inquiry is apparent on its face. Critically, **the contingencies did not occur**, which we now know because the primary referenced in the AOR has occurred. For example, the candidate did not expend in excess of $350,000 of personal funds in the primary, let alone transfer $350,000 in personal funds from the primary to general. The draft opinion buries any mention of this critical fact in its footnote 2, where it notes that the candidate loaned $175,000 to her committee on September 30, 2003 (but apparently does not bother to ascertain whether or not any additional funds were loaned). To be clear, there were no additional funds loaned to the campaign. Thus, the Millionaires' Amendment was not even triggered in the primary election!

Further, there is no basis to assume that these funds were the same funds that were transferred to the general election. In fact, the AOR itself acknowledges that it is a hypothetical with statements like "[s]hould she spend enough personal funds in the 2004 general election . . .," and "if [the candidate] contributes personal funds to her campaign before the primary election that remain on hand after the date of the primary . . ." The Commission cannot issue an Advisory Opinion based on "should's," "if's" and other contingencies.

Thank you for your consideration of these comments.

Respectfully submitted,

Donald F. McGahn II
Counsel for Friends of Melissa Brown

cc: The Honorable Ellen L. Weintraub
The Honorable David M. Mason
The Honorable Danny L. McDonald
The Honorable Scott E. Thomas
The Honorable Michael E. Toner

National Republican Congressional Committee

Donald F. McGahn II
General Counsel

May 12, 2004

The Honorable Bradley A. Smith
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: **Comments Opposing Draft Advisory Opinion 2004-13**

Dear Chairman Smith:

These comments on Draft Advisory Opinion 2004-13 are submitted on behalf of the National Republican Congressional Committee ("NRCC"). **The NRCC opposes the draft opinion,** as it responds to a hypothetical question, is contrary to the clear language of BCRA and Commission regulations, changes what is believed to be the current rule, and as a matter of public policy comes down firmly on the side of incumbent protection.

1. Hypothetical Question.

First, the draft opinion is based entirely on a hypothetical question:

> If, before the primary election, the Opposing Candidate contributes to her campaign personal funds that remain on hand after the date of the primary, would these funds be considered "expenditures from personal funds" in the general election if those remaining funds are transferred to the general election campaign? If the Opposing Candidate transfers personal funds exceeding $350,000 from the primary election campaign to the general election campaign, would the Opposing Candidate be required to file an FEC Form 10?

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Given that the questions use the word "if" no less than three times, the hypothetical nature of the inquiry is apparent on its face. Critically, **the contingencies did not occur**, which we now know because the primary referenced in the AOR has occurred. For example, the Opposing Candidate in this case did not expend in excess of $350,000 in the primary, let alone transfer $350,000 in personal funds from the primary to general. The draft opinion buries any mention of this critical fact in its footnote 2, where it notes that the candidate loaned $175,000 to her committee on September 30, 2003 (but apparently does not bother to ascertain whether or not any additional funds were loaned). Thus, the Millionaires' Amendment was not even triggered in the primary election!

Further, there is no basis to assume that these funds were the same funds that were transferred to the general election. In fact, the AOR itself acknowledges that it is a hypothetical with statements like "[s]hould she spend enough personal funds in the 2004 general election . . .," and "if [the candidate] contributes personal funds to her campaign before the primary election that remain on hand after the date of the primary . . ." The Commission cannot issue an Advisory Opinion based on "should's," "if's" and other contingencies.[1]

2. Not Consistent and Contrary to BCRA and Commission Regulations.

Second, even if there were some facts that caused the AOR to be ripe for review, the draft opinion is not consistent with, and is contrary to, 2 U.S.C. § 441a-1, 441a(i) and 11 C.F.R. § 400.1 *et seq.*, collectively referred to as the "Millionaires' Amendment." The statute, by its own language, is clear that the so-called Millionaires' Amendment is election specific. For example, with respect to the calculation of the opposition personal funds amount:

> (A) In general. The opposition personal funds amount is an amount equal to the excess (if any) of –
> (i) the greatest aggregate amount of expenditures from personal funds . . . that an **opposing candidate in the same election** makes; over
> (ii) the aggregate amount of expenditures from personal funds made by the candidate with respect **to the election**.

The analysis ought to end here – the statute clearly references the "opposing candidate in the same election." There is no reference to the opposing candidate in the general election who self-funded in the primary, expended funds in the primary that were rolled over to the general or anything of the sort. Instead, the statute is clear and unambiguous: "in the same election."

Another example is found in the reporting provisions:

> (E) Contents. A notification under subparagraph (C) or (D) shall include –
> (i) the name of the candidate and the office sought by the candidate;
> (ii) the date and amount of each expenditure; and

[1] There is no excuse for the hypothetical nature of the request. The Pennsylvania primary has occurred, yet the General Counsel's office has not asked the requestor a single question about whether or not any or its contemplated possibilities have occurred. This is in stark contrast to the treatment other requestors have received on other BCRA issues. *See* AOR 2003-37.

(iii) the total amount of expenditures from personal funds that the candidate has made, or obligated to make, **with respect to an election** as of the date of the expenditure that is subject to the notification.
(F) Place for filing. Each declaration or notification required to be filed by a candidate under subparagraph (C), (D), or (E) shall be filed with –
(i) the Commission; and
(ii) **each candidate in the same election** and the national party of each **such candidate**.

The point is once again made in subpart 2 of the notice section, explicitly distinguishing between primary and general elections:

(2) Notification of disposal of excess contributions. In the next regularly scheduled report after the date **of the election for which a candidate seeks nomination for election to, or election to,** Federal office . . .

Despite this statutory language, the draft opinion resorts to linguistic sleight of hand to support its conclusion (and buries it in a footnote): "Neither the Act nor Commission regulations expressly address transfers of personal funds between a candidate's primary and general election campaigns." AO 2004-13 p. 5, nt. 3. Whether or not that is true is irrelevant; it is clear that the statute could have addressed such transfers, but does not. For example, the notification section could have said that notice must be sent not only to each candidate in the same election, but in the event that the candidate has funds left over from the primary, to each candidate in the next election. Or elsewhere the statute could have said that in the event a candidate self-finances in the primary, this could somehow affect the financing limits of the general election. But it does not say any of this; instead, it explicitly distinguishes between elections, and makes the Millionaires' Amendment election specific. Thus, the Commission is left with only the statutory language drawing a clear distinction between elections.

The draft opinion admits it lacks a statutory or regulatory basis when it states (in the same footnote): "To not treat such transfers as expenditures from personal funds for the general election, however, would circumvent the underlying purpose of the Millionaires' Amendment." What is the underlying purpose of the Millionaires' Amendment? And why does that overrule the statutory language? The draft opinion does not say.[2] Nor does the AOR, save for what it calls "logic."[3]

The Commission's own regulations are equally clear, and also draw the distinction between primary and general elections. Specifically, section 400.2 states:

(a) For purposes of this part, election cycle means the period beginning on the day

[2] In fact, upon close inspection, the draft opinion lacks any legal basis for its conclusion. It cites 11 C.F.R. § 110.3(c)(3) for the proposition that "any carryover . . . is considered a transfer." But that section does not "consider it a transfer"; what that section really says is that transferring unused primary money to the general is legal. The section has nothing to do whatsoever with the Millionaires' Amendment, and in no way supports the conclusion of the draft opinion.

[3] The notion that "logic" is to be a guiding principle when construing BCRA is absurd. Perhaps the usual canons of statutory construction might be a more sound approach.

after the date of the most recent election for the specific office or seat that a candidate is seeking and **ending on the date of the next election** for that office or seat.

(b) For purposes of paragraph (a) of this section, **a primary election and a general election are considered to be separate** election cycles.

(c) For purposes of this part, a run-off election is considered to be part of the election cycle of the election necessitating the run-off election.

3. Changes the Current Rule.

The draft turns the Commission's own regulations on their head,[4] and represents a change to what is perceived to be current law. To date, eleven states have already held congressional primaries (some have had run-offs). Candidates on both sides of the aisle have self-funded, and have operated under the belief that funding for the primary does not affect funding for the general. Changing this belief – a belief based on a plain reading of the pertinent statutory and regulatory language – will cause chaos. At least one Commissioner has publicly taken the position that the rules ought not change mid-election cycle. In referring to the activities of so-called 527 groups, "FEC Vice Chairman Ellen L. Weintraub, a Democrat, has voiced similar concerns and has adamantly criticized efforts to change election practices in the middle of the 2004 contest." Thomas B. Edsall, *Delay Urged for FEC Action On Pro-Democratic Groups; General Counsel Says Issue Involving 'Soft Money' Is Complex*, The Washington Post, May 12, 2004. Frankly, the Millionaires' Amendment is complicated enough as it is, and in some instances has already proven to be fraught with legal danger. The Commission ought not further complicate matters by changing the rules mid-election.[5]

4. Incumbent Protection.

Ultimately, despite the Commission's prior efforts to promulgate rules that level the playing field between challengers and incumbents, *see* 11 C.F.R. § 113.1 (candidate salaries), the draft takes the opposite approach, and comes down squarely on the side of incumbent protection. Incumbents rarely self-finance, and thus would rarely trigger the so-called Millionaires' Amendment. Instead, it is the challenger candidates who would ordinarily trigger the provision,

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[4] Perhaps the most egregious example of this is where the draft actually cites the four definitions of "expenditure from personal funds" found in 11 C.F.R. § 400.4(a) (which by its own terms references "for the purposes of influencing the election in which he or she is a candidate," which in this case was the primary election), but later pulls a fifth definition out of thin air, asserting that the transfer from the primary to the general is somehow an expenditure from personal funds (even though section 110.3(c)(3) calls it a transfer). The analysis completely unravels, because to claim that the date of the transfer is actually the date of the expenditure would mean that the original expenditure from personal funds was not actually an expenditure, but something else.

[5] This is particularly true here, where the question posed is hypothetical. The draft opinion answers the question broadly in the affirmative, but does not pause to contemplate the possibility that the assumption upon which the AOR was based did not occur. One could easily imagine a situation where such a broad answer is taken by the requestor to be the proverbial green light, but where the facts do not support the triggering of the Millionaires' Amendment. This leaves the timing of the resolution of the inevitable complaint to the vagaries of the Commission's enforcement docket. If such resolution does not occur after the election, the requestor will profit from their potential violation, compromising the election itself.

which in most instances would then allow the incumbents to raise even more funds than they already have. The draft, if adopted, would provide yet another advantage to incumbents.

Thank you for considering these comments.

Respectfully submitted,

Donald F. McGahn II

cc: The Honorable Ellen L. Weintraub
The Honorable David M. Mason
The Honorable Danny L. McDonald
The Honorable Scott E. Thomas
The Honorable Michael E. Toner

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5 This is particularly true here, where the question posed is hypothetical. The draft opinion answers the question broadly in the affirmative, but does not pause to contemplate the possibility that the assumption upon which the AOR was based did not occur. One could easily imagine a situation where such a broad answer is taken by the requestor to be the proverbial green light, but where the facts do not support the triggering of the Millionaires' Amendment. This leaves the timing of the resolution of the inevitable complaint to the vagaries of the Commission's enforcement docket. If such resolution does not occur after the election, the requestor will profit from their potential violation, compromising the election itself.